72-1150

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MICHAEL RODAK, JR.,

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

In the Matter of DALLAS CABANA, INC., Bankrupt, JEROME B. ROSENTHAL, ROSENTHAL and GREEN, CABANA MANAGEMENT, INC. and DALLAS CABANA, INC. (BK3-1210),

Petitioners,

v.

WILSON F. COLLIER, Trustee,

Respondent.

Brief in Opposition to Petition For Writ of Certiorari

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REPLY BRIEF NOT PRINTED

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OPINION BELOW

The opinion below is reported in 469 F. 2d 660.

RESTATEMENT OF QUESTIONS PRESENTED

Neither of the "Questions Presented" as set forth in Petitioner's Brief are raised by the record below. Petitioner's problem is not that he was denied a hearing on disqualification, but that the grounds he alleges for disqualification are being held insufficient as a matter of law. The issue actually raised by the case might be fairly stated as follows:

May a Trustee in Bankruptcy engage as special counsel for

a specific matter or purpose one who is also the attorney for the bankrupt.

By the same token, the Referee in Bankruptcy did not "Summarily punish" Petitioners because he "personally deemed" their actions offensive as Petitioners assert in their second question. The question actually raised by this case is "may a Referee in Bankruptcy sustain a Trustee's objection to a Proof of Claim when the proponent of the claim refuses to submit to cross-examination by the Trustee at the objection hearing."

STATEMENT OF THE CASE

Respondent does not agree with the accuracy of the statement of the case as set forth in Petitioner's Brief. Regrettably, some factual statement is necessary to set the peculiar flavor of this case.

Jerome B. Rosenthal (Rosenthal and Green) served from 1960 to 1968 as the attorney, accountant, business manager, and financial advisor to the Melchers. After the death of Martin Melcher, he also served for a period as counsel for the Melcher probate proceedings.[1] The termination by the Melchers of further representation of them by Rosenthal has lead to an intense, emotional hostility between those parties, which surfaces from time to time in the bankruptcy proceeding. (Tr. 600).

Among the several investments Rosenthal made for the Melchers was the Dallas Cabana, Inc. (the bankrupt). The vehicle for this investment was to have been a limited partnership, although one was never formed. (Tr. 613, 622). Rosenthal

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[1] This was at a time when he also held disputed claims of debt and title in the same estate.

took over actual management of the hotel, which he retained until he turned it over to Wilson F. Collier, Trustee, after this proceeding was filed. (Tr. 3156). Cabana Management, Inc., Rosenthal as president, had been formed as the management entity and was, supposedly, to receive 1% of the gross revenue for its fee. (Tr. 622, 3187).

The operation of the hotel was never profitable, but managed to survive only because Rosenthal continued to advance Melcher funds to cover the losses. (Tr. 621-622, 3182). After the termination of Rosenthal and the employment of new counsel,[2] the Melchers refused to advance any further funds. The predictable result was not long in happening, and reached a crisis when the holder of the first lien announced its intention to foreclose.

To halt this action, Rosenthal filed a petition for an Arrangement Under Chapter XI, obtaining a temporary injunction against the foreclosure. (Tr. 591, 3160). A few days later, a second petition for an Arrangement was filed for the same corporation with the same hotel, but showing a different set of officers and directors. This second proceeding is the one in which J. Ronald Trost[3] and William J. Rochelle, Jr. appear as the attorneys for the Debtor-Bankrupt.

Although Rosenthal apparently conceded the corporate ownership of the hotel when he filed the petition for the Arrangement and obtained the injunction, he seemingly reversed that

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[2] The attorneys for Doris Day Melcher throughout these proceedings have been Chester A. Lappen and John D. Harris, while William A. McKenzie represents the estate of Martin M. Melcher. Neither of the bankrupt's attorneys have ever represented either of the Melchers.

[3] Then with the firm of Quittman, Stuttman, Treister and Glatt, but now with Shutan and Trost.

position, when he discovered that Wilson F. Collier had no intention of returning management to Rosenthal, and further that a prospective cash buyer was then available at a figure sufficient to pay all trade debt and liens. In his new position, Rosenthal contended the bankrupt did not own the hotel, but instead it belonged to a partnership not in bankruptcy.[4] Under the new thesis, the Trustee no longer had any right to the hotel but he and the trade creditors should sue Doris Day Melcher (as a solvent partner) both for her partner's liability and upon breach of her "duty" to continue to cover the losses. This is the title contest which was the major issue upon the merits.

The other issue upon the merits was that of the creditor claims of Petitioners. A Plan of Arrangement was actually filed by Dallas Cabana (the Melcher version) under which the hotel would have been sold to Donald K. Pritzker of the Hyatt Corporation.[5] As with any Plan of Arrangement, it must be approved by a majority of the unsecured claims, both in number and amount, before it can be considered for confirmation. When the Plan of Arrangement was first presented, the claims filed by the Petitioners totalled $558,262.00. The proposed Plan of Arrangement was approved by 100 creditors in an amount of $1,862,000.00. At this point, it appeared Petitioners would be outvoted, however, they then filed amendments to both claims, raising the total to $2,296,176.34. As a result, the Rosenthal

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[4] The only evidence of partnership which petitioners could produce were the tax returns of the Melchers, which they themselves had prepared.

[5] The hotel was ultimately sold by the Trustee to Donald K. Pritzker for $4,350,000.00. The Trustee had first reported a sale to one Howard Johnson for $4,500,000.00 but the latter never made the required cash deposit.

interests claimed over 51% of the total debt and enjoyed a "veto" power over any Plan of Arrangement. (Tr. 3157-8). The amount sought, incidentally, is in addition to the $2,192,724.00 actually paid to Petitioners by the Melcher interests during this same period.

ARGUMENT AND AUTHORITIES

1. THERE IS NO CONFLICT OF INTEREST WHEN THE TRUSTEE EMPLOYS THE ATTORNEY FOR THE BANKRUPT AS SPECIAL COUNSEL UPON A SPECIFIC MATTER INVOLVING NO CONFLICT IN DUTIES.

Of course the attorney for the bankrupt should not be the attorney for the Trustee but that obvious fact does not control this case. The attorneys for the Trustee are Jay W. Ungerman and Philip I. Palmer, Jr. Neither they, nor any member of their firms have ever had any connection of any kind with either Dallas Cabana, Inc. or any of its principals. There has never been any challenge by Respondents to the accuracy of that statement.[6]

At the outset, the Trustee (then Receiver) and his attorneys, Ungerman and Palmer, were presented with two radically different versions of the bankrupt, its assets and liabilities. These attorneys visited with both sides, and their attorneys, investigated the available evidence and reached the firm conclusion that the Melcher version was not only correct in law and fact but was also by far the better course for the unsecured creditors. The

[6] The application to remove counsel filed with the Referee did include Philip I. Palmer, Jr. because he was "actively engaged, along with J. Ronald Trost, in connection with the conduct of this litigation and should be disqualified as co-counsel for the Trustee for the same reasons". The challenge was dropped from the similar motion filed with the District Court and was not raised again on the appeal.

claims could be paid in full by the Melcher version but would receive nothing from the Rosenthal position.

When confronted with these two views, the Trustee was entitled to and did receive independent legal analysis and impartial investigation to reach his decision. Just reaching a decision does not end the Trustee's duty, however, for he is now charged with carrying out that which he has determined to be in the best interests of creditors. Specifically, in this case, he must dispose of the contention that the hotel was not in the bankruptcy court; he must sell the hotel at a price sufficient to pay all legitimate claims, and third; he must see that neither the Melcher nor the Rosenthal claims share equally with trade creditors.

It was concluded that the title question and the challenge to the Rosenthal creditor claims would involve considerable documentary background going back some ten years, much of which was located in California. Rather than charge the time to educate themselves upon these matters, it seemed more economical and swifter to employ the attorneys for the bankrupt to handle both the title contest and the challenge of the Rosenthal claims. Since these attorneys had already prepared themselves to litigate these same issues in the aborted arrangement proceeding there seemed to be no justification in duplicating the time already spent. Although on these issues, both the Trustee and Bankrupt (Melcher version) were in complete agreement, this is the conflict of interest to which so much time has been devoted by Petitioners.

A conflict of interest exists, of course, "when, on behalf of one client, it is his duty to contend for that which duty to another

client requires him to oppose". *A.B.A. Canon* 6. "No interest adverse * * * in the matters upon which he is to be engaged * * *" *Bankruptcy General Order* 44.

Even though Trost and Rochelle never actually represented any of the Melchers, since they were engaged to represent the Melcher version of the bankrupt it can be fairly assumed they are friendly to the Melcher interests. Accordingly, it would have been a conflict of interest to have hired Trost and Rochelle to contest the objection to the Melcher claims[7] but there would seem to be no conflict to engage them on matters upon which the Trustee and the Melcher interests are in complete agreement.

2. PETITIONERS WERE NOT DENIED A HEARING ON THEIR VARIOUS MOTIONS TO DISQUALIFY COUNSEL.

Petitioners were permitted to take depositions of J. Ronald Trost, Chester A. Lappen, Francis Quittner, and Donald K. Pritzker.[8] As a result of this extensive discovery, Petitioners alleged the specific grounds upon which their claim of conflict of interest is based. The Referee and District Judge Estes[9] were simply holding that as a matter of law the recited grounds were not conflicts of interest. Petitioners were permitted oral argument before each forum, the depositions upon which Petitioners rely have been considered and petitioners have at no point suggested any other or further evidence or even a suspicion of

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[7] These objections were filed and handled solely by Palmer and Ungerman for the Trustee, Harris and McKenzie for the claimants.

[8] Petitioners also deposed the attorney for Pritzker, Doris Day Melcher, her son, her accountant and five other principals and attorneys. (Tr. 3166).

[9] Also District Judge Taylor if the independent law suit filed by Petitioners against Referee Whitehurst be considered. (Tr. 3159-60)

further evidence that could be developed by further discovery.

Due process requires that each party litigant be entitled to raise and present his contentions. If those contentions are found wanting in merit, however, the court may rule, even on the pleadings. To illustrate the point by a *reductio ad absurdum*, if Petitioners contended that counsel were disqualified to serve because they were Jewish, due process would require no extended hearing.

The basic "conflict" that Petitioners set forth (Page 9, Petitioner's Brief) is as follows:

> "Rosenthal contended that the Melcher interests wanted to sell the hotel to Pritzker, and discovered that at an undisclosed meeting a deal had been made to sell the assets of the estate and that the bankruptcy forum would be used to give good title".

Instead of creating a conflict, this destroys a conflict for the Trustee also wanted to sell the hotel to Pritzker, made a deal to that effect and is (hopefully) using the bankruptcy forum to give good title. Trost and Rochelle disclosed their "undisclosed meeting" when they filed their Plan of Arrangement in the Chapter XI proceedings. The Trustee disclosed his "undisclosed meeting" when he filed an application to confirm sale to Pritzker. Not only is the agreement destructive of a "conflict" but the Respondent simply cannot conceive of any Trustee who would ever adopt the Rosenthal position and agree to give up the estate and have the creditors receive nothing. The Trustee here would, and should, oppose anyone who tried to take away the hotel. If the Melchers agree with that basic objective they may work together for that specific goal. On the other hand, should

the Melchers have disagreed with the Trustee then they would be opposed along with anyone else who stood in the way of payment to genuine creditors.

3. THERE WAS FULL COMPLIANCE WITH GENERAL ORDER 44.

Petitioners really put their question presented upon the ground that there was inadequate disclosure under General Order 44. Since that order is intended solely to expose possible conflicts of interest, Respondent has treated the conflict question as the basic issue. The text of the original affidavit is attached as an appendix to this brief, and discloses all connections by the special counsel to the bankrupt, possible principals and the source and amount of their fees.

The "undisclosed meeting" with Pritzker is the only fact which Petitioners assert should have been disclosed. (P. 5, Petitioners' Brief) Not only had it already been fully disclosed[10] but it posed no possible conflict since the Trustee was not bound by any agreement for sale the bankrupt might have had.[11]

4. A COURT MAY RULE AGAINST A CLAIMANT WHO REFUSES TO SUBMIT HIMSELF TO CROSS-EXAMINATION.

Petitioners would give the impression that they were given no opportunity to present their evidence when in fact the hearing went nine trial days and had over three hundred exhibits introduced.

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[10]Rochelle and Trost had already filed the unsuccessful Plan of Arrangement trying to sell the hotel to Pritzker.

[11]which is why the Trustee could try to sell to Howard Johnson for a higher price.

The Referee covers, in his certificate of review of May 7, 1970, (Tr. 3152-3210) the conduct of Petitioners in great detail. Before trial even commenced, Petitioners filed five motions for continuance and six other dilatory motions. There were also three refusals of Rosenthal to appear or testify during the trial, two refusals to appear for depositions, one refusal to obey an order to produce documents, and one refusal to answer written interrogatories.

Now Petitioner contends that he was punished for contempt, but that simply was not what happened. Rosenthal had testified on direct examination by his own attorneys but refused to take the stand to undergo cross-examination by the attorneys for the Trustee. (Tr. 3174). The Referee granted a short recess but gave warning that unless Rosenthal retook the witness stand he would deny the claims by default. (Tr. 3175).

Rosenthal did in fact take the stand, but by a variety of thinly veiled pretenses refused to answer any questions.[12] As a trained lawyer with over thirty years of experience, Rosenthal is exceedingly skilled in those tactics which bring about the result he desires. An evasive or incomplete answer is the same as a failure to answer, *Rule 37(a)(3) Federal Rules of Civil Procedure.* By the same rule, failure to answer questions after being directed

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[12]He couldn't say when he first rendered services to the hotel because "hotels can't have services rendered to them, they are collections of objects". (Tr. 3178). He couldn't say whether his law firm kept separate records of services to the bankrupt because "again, I must remind you that law firms by that designation are collective and do not refer to the individuals within it that comprise the law firm". (Tr. 3179) The efforts of the Trustee to cross-examine Rosenthal continued for a considerable period. The foregoing are only typical examples of the frustration tactics of Petitioners.

so to do is grounds for judgment by default. *Rule 37(b)(2)(B) Federal Rules of Civil Procedure.* While good grounds doubtless also existed for which the Referee could have certified Rosenthal to the District Court for contempt, that was not done.

This particular tactic has occurred before other courts by the same Rosenthal to the point that it becomes a pattern of conduct bearing upon evidence of good faith. Speaking of Rosenthal, the California Court of Appeals remarked about:

> "* * * persistently technical and dilatory opposition * * *"
>
> * * * * *
>
> "* * * recurring offensive conduct and language toward the judge." *Rosenthal v. Rosenthal,* 197 C. App. 2d 289, 17 Cal. Rptr. 186 (1961)

Even more precisely in point is the observation of the Supreme Court of New Mexico,

> "The statements of Mr. Rosenthal consisted of evasions, expressions of hostility, insults, admonitions, objections, demands that counsel explain what bearing questions had upon the issues as pre-requisite to answers, arguments and other similar responses." *Doanbuy Lease Co. v. Melcher,* 488 P. 2d 339 (N.M. Sup. Ct. 1971).

As this court has observed, in the more difficult area of criminal justice, the trial court has wide discretion in presenting flagrant disregard of elementary standards of proper conduct. *Illinois v. Allen,* (1970) 397 U.S. 337, 343.

5. NO JUSTIFICATION EXISTS FOR ISSUANCE OF CERTIORARI.

Petitioner brings forth no questions dealing with the merits. Instead he seeks to pose over-broad questions said to involve

important issues of Federal law. In truth, however, the genuine issues are narrow factual points, of importance only to this specific case. These factual issues have already been presented to three courts, and all have decided, without dissent, against the contentions of Petitioner. Litigation must end at some point with the reluctant losers held to have had not only their day in court but also their appeal.

CONCLUSION

The Petitioner for Writ of Certiorari should be denied.

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